No. 22,244

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE L. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment for the defendant entered on February 27, 1967, by the United States District Court for the Eastern District of California (TR 62, 63) on the cause of action pleaded in the complaint (TR 1, 2), and from the trial court's denial of a motion for new trial (TR 77-81).

The pleaded act of negligence of defendant occurred on or about May 23, 1963, at the United States Naval School of Aviation Medicine, an agency of the United States of America, in Pensacola, Florida. The complaint was filed on March 22, 1965, and thus was

within two years of the contended act of negligence (TR 1). The suit is against the United States of America and is governed by the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 et seq. (TR 38, 39).

The trial court granted judgment for the defendant on the basis that under the evidence the defendant was not shown to be negligent (TR 63, 65). Plaintiff, on March 8, 1967, filed a motion for a new trial (TR 69) which was denied on April 24, 1967 (TR 77-81).

Plaintiff, on June 22, 1967, filed in this court a timely Notice of Appeal under 28 U.S.C. 1291 (TR 82).

STATEMENT OF THE CASE

This is an action brought by George L. Smith for damages due to injuries suffered by him through the negligent acts of employees and agents of the United States of America.

1. Negligence Under Florida Law

Under the provision of 28 U.S.C. 2674, the United States is liable for its torts in the same manner and to the same extent as a private individual under like circumstances. This has been interpreted as requiring the application of the law of the State where the tort was committed to the facts of the case. *Boe v. U. S.* (C.A.N.D. 1965), 352 F.2d 551; *Williams v. U. S.* (C.A.Ga. 1965), 352 F.2d 477, appeal after remand 379 F.2d 719.

On page 3, Section 2, of Volume 18 of *Florida Law and Practice,* negligence is defined generally as the failure to exercise such care as the circumstances demand. This statement is elucidated by the following excerpt from pages 3 and 4 of the above cited work:

> "The Supreme Court of Florida has defined negligence as the failure to observe, for the protection of another's interest, such care, precaution and vigilance as the circumstances justly demand, or the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or the doing of what such a person would not have done under the circumstances.
>
> "Actionable negligence arises where the injury to one person is proximately caused by the failure of another to exercise such reasonable care and diligence as should have been exercised under the circumstances in view of the relation of the parties to each other at the time.[2] Negligence is measured by conditions at the place and time of injury, and in an action for an injury occasioned by the alleged negligence of a person, the negligence, if any, of such person, or of the person injured, is to be measured by the condition of things at the place where the injury took place, as they were known to exist by each of the parties at the time the acts of each are complained of as being negligent.[3]
>
> "The amount of care which a person is required to exercise depends on a large measure on the extent to which his conduct may involve a risk of harm to others, and as the likelihood that others may be injured increases, the amount of care which should be exercised also increases, and acts

that might be considered prudent in one case might well be negligent in another.[4]" (Footnotes omitted.)

A further expression of Florida law with reference to the duty owed by a person to business invitee is found on pages 15 and 16 of the above cited volume:

"Those who expressly or impliedly invite others upon their premises for purposes of lawful business, must use ordinary and reasonable care to maintain the premises in a reasonably safe condition for their use and are liable for derelictions in such respect of which they knew, or by the exercise of reasonable and ordinary care should have known. *A person who, under the circumstances, comes on the premises for the purpose of transacting business with the owner is known in the law as an invitee.*[53] In order for the relationship of invitor and invitee to arise, the person entering onto the premises, the invitee, must have done so for purposes which would have benefited the owner or occupant of the premises, the invitor, and this benefit must be of a material or commercial nature, rather than of a spiritual, religious or social nature.[54]" (Footnotes omitted; emphasis added.)

2. The Facts of this Case

The Pensacola Study of Naval Aviators, popularly known as the "Thousand Aviator Study" began in 1940 when 1,056 student aviators and flight instructors were examined on a variety of physiological and psychological parameters. This longitudinal study has been continued with follow-up examinations in 1951, 1957 and 1963.

George L. Smith, appellant, at the time of the inception of this study, was in a flight school training program with the United States Navy and was requested to volunteer as a participant in the Thousand Aviator program. This experimental group consisted of a portion of the officers, cadets and enlisted men undergoing flight training in Pensacola, Florida, from July, 1940, to May, 1941. Mr. Smith participated in the testing program through the years in accordance with the requests which he received from the United States Naval School of Aviation Medicine (Plaintiff's Exhibits 2-1, 2-2, 4 and 5, RT 22, 23, 35).

In 1962, Dr. Fregly became a member of the Vestibular Psychology branch of the Naval Aviation School of Medicine at Pensacola, Florida (RT 53). He began as a collaborative researcher, and has been active in the Thousand Aviator Study since 1963 (RT 54). Within that study, he is responsible for the Postural Equilibrium Test Battery, commonly known as the "Graybiel-Fregly Ataxia Test" (RT 54). This battery is composed of four tests: (1) Standing on the floor in a heel-to-toe position with eyes closed for a prescribed period of time; (2) Walking heel-to-toe with feet tandemly aligned on a ¾-inch wide rail with arms folded across the chest and eyes open; (3) Standing heel-to-toe with feet tandemly aligned on a ¾-inch rail, arms across the chest, eyes open; and (4) Standing heel-to-toe with feet tandemly aligned on a 2¼-inch rail with eyes closed and arms folded across the chest (RT 54, 55).

The purpose of these tests is to enable a study of the effect of age on the organs of balance to be made (RT 62). With reference to the Graybiel-Fregly Ataxia Test, "ataxia" is defined as a loss of motor ability or motor control (RT 77). "Vestibular ataxia" is defined as locomotor skill or postural equilibrium, as further defined in standing with eyes open and/or closed insofar as defects in the inner ear can be attributable as the source for the loss of motor ability or postural equilibrium (RT 78). It is further defined, with reference to the study of the cardiovascular effects of aging, as the base line study of balance as a function, or as it changes, in aging.

Dr. Fregly adapted this test from an older equilibrium test, his contribution to it being the addition of the positioning of the testee's arms folded across his chest for the purposes of limiting those skills of balance which would tend to enable the testee to have a more capable balancing position by use of the body and its extensions (RT 55, 57, 79, 82). In other words, it is a test of body capacity for balance, especially of the inner ear, apart from the learned skills of the person or the body postures which he is accustomed to using for balance (RT 79).

With regard to the effects of aging upon the inherent ability to balance oneself, Dr. Fregly's tests, at the time appellant (Mr. Smith) was being tested, had shown significant differences in the results of the ataxia test in different age groups (RT 84). For example, in the standing tests, that group comprised of testees from the ages of 17 to 42 attained a score

of 103.8 as opposed to a score of 52 for those in the age group of 43 to 50 (RT 86). In the walking tests, the score for the age group of 17 to 42 was 12.5 steps, as opposed to a score of only 10.4 steps for the group comprised of testees of the ages of 43 to 50 (RT 86). At the time he took the tests, Mr. Smith was the age of 47 and this fact was known by defendant at that time (RT 87, 90; Plaintiff's Exhibit 8).

In devising these tests, Dr. Fregly intentionally provided for the exclusion of the most commonly used and most efficient means of balance that a person has, his arms, so that it would be a true test of the inherent balance ability of the testee and not merely a test of his ability to regain balance or to use his arms or other balancing mechanisms to achieve or maintain his balance (RT 79). With this in mind, a ¾-inch rail was used for the test, since it was found that a rail of that particular width gave a greater distribution of scores (RT 69). In other words, a rail of the size upon which appellant fell was known by defendant at the time of the accident to have a propensity, more than rails of other sizes, to cause testees to lose their balance in such a way that a grading of the scores could be maintained (RT 69).

In addition, Dr. Fregly required that the testee's primary balancing faculties, his arms, be immobilized and thus rendered useless in case of a loss of balance, by having the testee fold his arms across his chest (RT 12, 55). He also required tandem alignment of the feet so that the testee would have as little use as possible of the foot platform as a balancing agent (RT 55, 87, 89).

Having never taken, nor having in any way experienced, the Graybiel-Fregly posture test in any of the previous sessions of the Thousand Aviator Study in which he participated, Mr. Smith was unaware of any danger inherent in the procedure, and had no apprehension or fear of doing something dangerous (RT 24). Examinees were given no warning, either visual or oral, as to the nature of the tests with relation to the fact that the test was designed to test the balance of the person and that his chances of losing his balance were increased because his natural balancing faculties were eliminated by the postural requirements of the test (RT 25). In the plaintiff's opinion, there was nothing particularly hazardous about the rail or the test that he was aware of or was informed of (RT 24, 32). No protective devices were used to aid the person being tested in case he did lose his balance. No railings or guards were provided (RT 16, 17), no carpeting was put around to cushion any falls (RT 19), nor were there any persons standing near to help the testee regain his balance, should he start to fall (RT 13, 80, 81).

In taking the test, Mr. Smith did, while explicitly following the instructions of the technician administering the tests, lose his balance, and fall, striking the metal rail on which he was walking with his right hip. As a result of this fall, and the damage resulting from it, the trauma caused asceptic necrosis in the right femoral head, which continues and which will completely degenerate the head in the course of time, disabling plaintiff (TR 2).

In his complaint, the plaintiff sought to hold the United States liable for the negligence of its agents in administering this test (TR 1, 2).

The court found that plaintiff was injured when he fell from the metal rail along which he was walking while participating in the Graybiel-Fregly Ataxia Test as a part of the Thousand Aviator Study at the Naval School of Aviation Medicine in Pensacola, Florida; that neither Dr. Fregly nor any other agent, servant or employee of the United States was negligent or careless in allowing the plaintiff to take the test as he did; that plaintiff failed to establish the negligence of defendant, or any of its agents, servants or employees, and therefore, was entitled to recover nothing by his complaint (TR 65). On March 9, 1967, plaintiff moved the court to set aside the judgment entered on the 27th of February, 1967, and to grant a new trial on the grounds of newly discovered evidence (TR 69). The motion for new trial was denied on April 24, 1967 (TR 81), and this appeal followed (TR 82).

SPECIFICATION OF ERRORS RELIED ON

This appeal is based on three errors of the trial court:

I. The District Court erred in ignoring the uncontroverted evidence that the government's agents, who were in a position of superior knowledge and control and upon whom plaintiff had a right to rely, were negligent in the conduct of the test which injured

plaintiff and were further negligent in not informing plaintiff of the dangers inherent in the test, which dangers were known only to them and could not be discovered or avoided by plaintiff through reasonable care and actions, and were further negligent in not protecting plaintiff from the injury flowing as a natural consequence from the dangerous situation in which they placed plaintiff.

II. The District Court erred in finding that there was evidence to support an order that there was no negligence on the part of defendant.

III. The District Court erred in denying a motion for a new trial on the grounds that the evidence could have been discovered with the exercise of due diligence and that it would not have changed the opinion of the court if a new trial had been granted.

I and II

ERROR IN IGNORING UNCONTROVERTED EVIDENCE OF NEGLIGENCE

In defendant's pretrial memorandum, it was stipulated that the substantive law of the State of Florida, where the accident occurred, is controlling in this case. 28 U.S.C.A. 1346(b) (TR 39).

The Supreme Court of Florida has defined negligence as the failure to observe, for the protection of another's interest, such care, precaution and vigilence as the circumstances justly demand, where the failure to do what a reasonable and prudent person would

ordinarily have done under the circumstances, *Smith Electric Co. v. Hinkley* (1929), 98 Fla. 132, 123 So. 564; *DeWald v. Quarnstrom* (1952), 60 So.2d 919, 921. Under the law of Florida the amount of care which a person is required to exercise in each situation depends to a great extent on the likelihood that his conduct may involve a risk of harm to others, and for this reason, acts that might be considered reasonable in one case might well be negligent in another, *Jacksonville Journal Co. v. Gilreath* (1958), 104 So. 2d 865.

It has been admitted that plaintiff held the relationship of an invitee to defendant since plaintiff was on the property of defendant for the purposes of conducting business for and with defendant (RT 120). It is Florida law that the owner or occupant of a place of business owes to an invitee who is on the premises in pursuit of business the duty to exercise reasonable care to maintain the premises in a safe condition and to guard against subjecting the invitee to dangers which are known to the owner or which the owner might reasonably anticipate. *Howland Inc. v. Morris* (1940), 143 Fla. 189, 196 So. 472; *McNulty v. Hurley* (1957), 97 So.2d 185, 188.

In the case of *Hall v. Holland* (1950), 47 So.2d 889, a case decided in the Supreme Court of Florida, the court stated, at page 891, that the owner-occupier of a premises has the duty to an invitee

> "to use reasonable care in maintaining the premises in a reasonably safe condition and to have given plaintiff timely notice and warning of

> latent and concealed perils, known to the defendant, or which by the exercise of due care should have been known to him, and which were not known by the plaintiff. . . ."

On page 892 the court expanded this statement by saying,

> "The duties to keep the premises safe for invitees extends to all portions of the premises which are included within the invitation and which it is necessary or convenient for the invitee to use or visit in the course of the business for which the invitation was extended, and at which his presence should therefore reasonably be anticipated or to which he is allowed to go."

The facts of the case at bar blend in perfectly with the statements and reasoning of the court in *Hall v. Holland.* Here we have a case where the plaintiff had come on to the property of defendant for the purpose of conducting business with the defendant and to be subjected to tests for the benefit of defendant at defendant's request so that defendant could continue and complete the Thousand Aviator Study (RT 6, 7, 22, 23, 35).

The portion of the "Thousand Aviator Study" with which we are concerned in this case is the "Graybiel-Fregly Ataxia Test." On page 77 of the Reporter's Transcript on Appeal, Dr. Fregly defines the term "ataxia" as "a loss of motor ability." Further on page 77 he defines the testing of vestibular ataxia as "a test of the loss of locomotor skill in one instance or of postural equilibrium as further defined as standing

with eyes open and closed insofar as defects in the ear can be attributed as a source for the loss of this ability." Dr. Fregly testified further as reported on page 79 of the Reporter's Transcript that the test was devised to develop a stringent body position which would rule out any gimmicks or anything that would lessen the scores for maintaining the balance, such as swinging the arms or letting the subjects ad hoc body postures which would give all sorts of scores which would eventually be meaningless to interpret.

Dr. Fregly is a research psychologist at the Naval Aerospace Medical Institute. He is employed in the vestibular psychology branch, medical sciences division. He was instrumental in developing the Graybiel-Fregly Ataxia Test and is directly responsible for the postural equilibrium test battery in the Thousand Aviator Study (RT 53, 54).

As described by Dr. Fregly, the test "involved (1) Standing on the floor, head-to-toe; (2) walking a ¾-inch wide rail, 8 feet in length, with eyes open; (3) standing on the rail with eyes open; (4) standing on the 2¼-inch wide rail with eyes closed" (RT 54, 55). As depicted on page 58 of the Reporter's Transcript of the trial, the body position is designed so that all means of maintaining balance except for the use of the head are eliminated. On page 87 of the Reporter's Transcript, Dr. Fregly describes the position of the feet of the testee as being tandemly aligned "so the tandem alignment narrows the base of support as much as it can be narrowed." On page 88 he amplified this by a statement that the purpose

of the tandem alignment is to narrow the base of support to get more at the inner ear contribution to maintain balance and to make a greater demand on the balance sensation from the inner ear.

Additionally, on pages 62 and 87 of the Reporter's Transcript, Dr. Fregly states that the balance test is used to study the effect of age on the organs of balance. He testified that there is adequate and significant evidence that there is a marked change in the balance results of tested individuals between the ages of 42 and 43. In the group from 17 to 42 years old the score was 103.8 and the group comprised of 43 to 50 year olds scored 52. These scores were compiled in the test of standing with eyes closed on the rail. In the test of walking on the rail, the 17 to 42 year old group scored 12.5 steps while the 43 to 50 year old group scored only 10.4 steps. At the time of the test appellant was 47 years of age and Dr. Fregly admitted that at the time he tested appellant he knew that a person of his age would probably be less successful on the rail than a younger person would be (RT 84, 86).

Of paramount importance in this case is the relationship of the parties in terms of the superior knowledge of defendant's agent and the right of plaintiff to rely thereon. As co-originator and co-designer of the Graybiel-Fregly Ataxia Test, Dr. Fregly was also the person in charge of conducting the test at the time that appellant was injured (RT 54). As detailed above, he was in a position of superior and prior knowledge as to not only the nature

of what was being tested, i.e., the inherent balance of persons of differing ages and how this balance was affected by the effects of age and aging, but also was in such a position with reference to the dangers inherent in this test in that the testing of balance necessitates the conclusion that some testees would lose their balance (RT 82, 86). Were it otherwise, no "test" would occur, for it proves nothing scientifically or practically if all parties being tested are able to achieve a perfect score.

Plaintiff, on the other hand, was ignorant not only of the nature of the test but of its dangers. In the previous years in which he had volunteered his services to the United States Government in the conduct of the Thousand Aviators Study, the Graybiel-Fregly Ataxia Test had never been administered (RT 54). Therefore, he was completely unfamiliar with it, its results, and its dangers and justifiably relied on the persons conducting the test to administer it in a safe manner with protection from dangers inherent therein.

This, then, adds to the relationship of owner-occupier and invitee the fact that the owner-occupier is in a position of superior knowledge in a situation in which the invitee is relying on the owner-occupier for instructions, guidance and counselling in the conduct of these inherently dangerous tests.

By Dr. Fregly's own admissions the very purpose and nature of these tests were to find out at what point and how frequently the testees would lose their

balance under certain uniform conditions designed to induce the loss of balance (RT 48, 62, 78, 84). As outlined above, a test of balance would not be a test at all if it were not probable that some of the testees would in fact lose their balance. A test in which perfect results may be reached by all testees is not a test at all, but a mere recordation of man's normal, expected functions. From this, then, it is seen that it was not only within the realm of possibility that a person would lose his balance while taking the Graybiel-Fregly Ataxia Test, but it was a great probability that this would be so, and in fact this is what happened in the case of the plaintiff, who lost his balance, and fell to the rail, causing the injury complained of (RT 18, TR 2, 65).

Relating this back to the statement and requirements of the Florida Supreme Court in *Hall v. Holland,* supra, appellant was given neither the timely notice of or warning of latent and concealed perils which were known to the defendant and not known by appellant, nor did appellee fulfill his duty to keep the premises safe for invitees in the realm of things included within the invitation and which were necessary and convenient for the invitee to use or visit in the course of the business for which the invitation was extended. (See *Christopher v. Russell* (1912), 62 Fla. 191, 58 So. 45; Restatement of Torts, Sec. 343.)

From the records, as related above, we find uncontroverted facts which show that defendant was conducting a test of balance on a person who not only had no knowledge of the purpose and dangers of the

test, but of one who unknowingly was in an age bracket in which the dangers of losing one's balance were much greater than those for a younger person; that appellee knew of these dangers and understood them and did not warn appellant of them; that in instructing appellant in the manner in which to take the test, all possible means of restricting and eliminating appellant's natural balance maintaining faculties were removed; that the test itself was inherently dangerous since it required a person to walk on a very narrow metal rail without benefit of the use of a man's normal balancing aids, the extremities, and with the feet placed in an awkward position, a difficult task in itself even when not performed on a rail.

In addition to these factors, and will full cognizance of the above described dangers and a full realization of the fact that when a person is being tested for balance it is reasonable to assume that a few will lose their balance and in losing their balance it is even more reasonable to assume that some may fall, defendant made no attempt in any manner or in any way to guard against the possibility or probability of falls resulting from the loss of balance following as a normal, reasonable, expected result of the test, which falls were a natural consequence of the test being administered. Nor were any guard rails, hand rails, paddings, or other special attempts made to minimize the danger of injury once the fall occurred. Only one technician was in any proximity of plaintiff when he was taking the test and that person not only was too

far away to be of any assistance, but he was occupied and pre-occupied with the technical aspects of the administration of the test to each individual in that he was recording data and reviewing the list of things to be covered in the test (RT 13, 14, 80). Dr. Fregly was in the room supervising the conduct of the test, but was sitting behind a desk twelve feet away, was not watching for falls, did not see appellant fall, and could not have helped if he had (RT 80, 81).

In conclusion then we urge that the court look to the uncontroverted facts and find that, as a matter of law, defendants were negligent to the invitee who had volunteered his services for the benefit of the defendant in that they had placed him in a potentially dangerous situation which was fully appreciated by defendant's agents, and not appreciated or understood at all by appellant, without giving appellant any warning of these dangers, and that in so doing, they breached the duty which had arisen between appellant and appellee because of the inviter-invitee relationship. That as a proximate result of this breach, plaintiff was caused to lose his balance and to fall in a situation about which he had no warning and against which he was prevented from protecting himself by the nature of the test, thereby striking his hip upon the iron rail injuring himself in such a manner as to be crippled for life.

For these reasons and on these facts, we urge that defendant be held negligent as a matter of law in instructing plaintiff to take a test of balance, knowing that plaintiff was unaware of the dangers inherent

therein, in such a manner as to deprive plaintiff of his natural balancing safeguards without informing plaintiff of the danger and without making any provision to protect him from that danger.

III

GROUNDS FOR A MOTION FOR NEW TRIAL

Rule 60(b) of the Federal Rules of Civil Procedure (28 U.S.C. Rule 60) provides that the court may relieve a party from a final judgment for several reasons, one of which is "newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." It is well settled that this rule should be given a liberal construction in order to do justice and to prevent hardship upon the party. *Barber v. Turberville* (1954), 218 F.2d 34, 94 U.S.App.D.C. 335; *Laguna Royalty Co. v. Marsh* (1965), 350 F.2d 817.

It is generally held that motions for relief from final judgment on the grounds of newly discovered evidence are within the discretion of the trial judge. This discretion is not an arbitrary one, but must be based on a sound discretion guided by accepted principles. *Smith v. Stone* (1962), 308 F.2d 15, 17. In the case of *Stilwell v. Travelers Ins. Co.* (1964), 327 F.2d 931, at page 933, the court held that the trial court's refusal to grant relief from judgment on the grounds of newly discovered evidence because the trial court concluded that the moving party had only presented

a different opinion based on facts already presented in the original trial, constituted the application of an incorrect standard and an abuse of the trial court's discretion.

In the case at bar the plaintiff made a motion for a new trial on the grounds that he had discovered evidence of which he was ignorant at the time of trial and which he could not have discovered even with the exercise of due diligence. The new evidence had to do with three areas of testimony which are a part of the record (TR 70, 71, 72, 74, 75).

The first such area of testimony had to do with the question of the surface of the rail which plaintiff walked as a part of the test which he took during the Thousand Aviator Study. Had this evidence been introduced at the time of trial it would have established the fact that defendant had been negligent in conducting the test on a rail which was by its nature dangerous because there was no provision made to prevent slippage of the testee's foot or to maintain the rail in such a manner as to prevent the deterioration of such precautions (TR 72, 76).

For the second area of testimony, the evidence would show that contrary to the statement of the examiner, plaintiff and other witnesses had not been given written instructions on how to take the test. For that reason plaintiff was not warned and had no sufficient understanding of the nature and intrinsic dangers of the test as claimed by defense counsel (TR 72, 74).

The third area of testimony, would, if introduced, establish that defendant had conducted the test, not only in contravention of logic and reasonable standards of safe conduct, but also contrary to the instructions and the rationale of the person who had invented the test in that the test booklet requires that the test be given with the arms folded across the chest (TR 78); however, both plaintiff and another witness would testify that contrary to this instruction they were allowed to take test with his choice of either folding his arms across his chest or holding his arms flat against his sides (TR 74, 78).

Based on this new evidence, the court would have to find that defendant was negligent in administering this test. Therefore, since the evidence was substantial and was discovered in due course only after the trial through the diligence of plaintiff, we urge that the court was in error in rejecting the motion for a new trial thereon and request that the decision be reversed and a new trial be granted.

CONCLUSION

In weighing and analyzing the evidence outlined and described above, the following conclusions must be reached:

(a) Defendant deliberately, intentionally and knowingly tested plaintiff to the falling point with further knowledge that plaintiff was not aware of the purposes or dangers of this test;

(b) Defendant knew that by the very nature of the test, some testees *would* fall;

(c) Defendant afforded no warnings nor protection to the testees in the event of a fall;

(d) Defendant *should have known,* if defendant did not *in fact know,* that a fall would cause injury;

(e) Plaintiff did in fact fall while taking this test under the supervision of defendant and was injured as a proximate result thereof; and

(f) Defendant was therefore *negligent* as a *matter of law.*

The evidence before the trial court proved that the defendant was negligent as a matter of law and this appellate court should reverse the judgment of the trial court and direct it to find for the plaintiff on the issue of liability and to further try this case on the sole issue of damages.

If this appellate court cannot come to this requested conclusion upon this record, it should, and is hereby respectfully requested to, reverse the trial court's order denying appellant's motion for new trial

and order this case retried on all issues in the trial court.

Dated, Sacramento, California,
March 7, 1968.

Respectfully submitted,
PEASE, MAYHEW & KASSIS,
By JAMES E. KASSIS,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. KASSIS,
Attorney for Appellant.